Filed 2/22/13 Lund v. Olson CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BRADFORD D. LUND, Plaintiff and Appellant, v. TIMOTHY OLSON et al., Defendants and Respondents.	G046537 (Super. Ct. No. 30-2011-00506045) O P I N I O N

Appeal from an order of the Superior Court of Orange County, David T. McEachen, Judge. Affirmed in part and reversed in part and remanded.

Bohm, Matsen, Kegel & Aguilera and James G. Bohm for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Brian M. Daucher and Adrienne W. Lee for Defendants and Respondents

* * *

Plaintiff Bradford D. Lund appeals from the order dismissing his lawsuit against his half-sisters and their husbands, defendants Kristen Lund Olson, Timothy Olson, Karen Lund Page, and James Page (non-attorney defendants), based on the forum non conveniens doctrine, contending the court erred in granting the motion and dismissing, rather than staying, the action. We affirm the court's finding of forum non conveniens but reverse the order to dismiss and remand with directions to either (1) deny non-attorney defendants' motion to dismiss or stay the action, or (2) grant the motion to stay the action subject to non-attorney defendants' agreement to toll applicable Arizona statute limitations from the filing of the California action until 90 days after the remittitur in this case issues.

Although the opening brief also refers to Burch & Cracchiolo, Daniel Cracchiolo and Bryan F. Murphy (attorney defendants), plaintiff did not separately appeal from the subsequent order dismissing them for the same reason and we dismissed them from the appeal. We thus do not consider any argument on appeal with respect to attorney defendants.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff's mother, the daughter of Walt Disney, established trusts for plaintiff and his two sisters upon her death. His sister Victoria died without children in 2002. Plaintiff believed her trust assets were distributed evenly between him and his remaining sister, Michelle, who subsequently suffered a brain aneurysm in 2009. Michelle survived but while she was undergoing treatment, plaintiff's aunt, Diane Disney Miller, and his half-sisters, non-attorney defendants Kristen Olsen and Karen Page, petitioned the court in Arizona to have a guardian and conservator appointed for plaintiff.

In September 2011, plaintiff, who resides in Arizona, filed a lawsuit in California alleging breach of fiduciary duty, invasion of privacy, plus conspiracy and aiding and abetting to induce these torts. According to plaintiff, all defendants conspired with the trustees of his trust to bring the conservatorship action in order to gain control over his trust assets because they believed he would inherit his sister's wealth if she were to die from the brain aneurysm. The complaint further pleads Orange County is an appropriate venue because that is where the acts constituting the alleged torts occurred, e.g. where non-attorney defendants met with co-trustees and the attorney defendants met with his sister Michelle "while she was under a conservatorship to unduly influence her and enlist her financial support and aid in causing the [c]o-[t]rustees to breach their fiduciary duties to [plaintiff] and invade his privacy."

Non-attorney defendants moved to dismiss the complaint on the grounds of inconvenient forum because none of the parties to the action reside in California. They attached declarations showing Kristen Olson and her husband, Tim, live in Arizona, while Karen Page and her husband, Jim, live in Utah but would consent to the jurisdiction of the Arizona courts. All four also agreed to toll the statute of limitations from the date the action was filed in California to the time it was filed in Arizona, "so long as such filing occurs in Arizona within 90 days of an order . . . staying or dismissing this case for inconvenient forum." They further sought judicial notice of related litigation pending between the parties in Arizona.

At the hearing in December 2011, the court issued a tentative ruling granting non-attorney defendants' motion to dismiss and allowed plaintiff to argue the matter. It took the matter under submission and two days later issued a minute order granting the motion, finding plaintiff's "choice of forum . . . not a significant factor" because he is a resident of Arizona, and "the other private and public factors favor Arizona." It granted non-attorney defendants' request for judicial notice of the existence

of the various lawsuits in Arizona and dismissed, rather than stayed the action because "no California residents are involved."

DISCUSSION

1. Burden of Proof

"Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere. [Citation]" (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751.) In ruling on such a motion, the court engages in a two-step process. First, it decides "whether the alternative forum is a 'suitable' place for trial." (*Ibid.*) If it makes that finding it next "consider[s] the private interests of the litigants and the interests of the public in retaining the action for trial in California." (*Ibid*.) As the moving party, the defendant "bears the burden of proof." (*Ibid*.)

Plaintiff contends the court prejudicially erred in placing the burden of proof on him to prove California is not an inconvenient forum rather than on non-attorney defendants to prove otherwise. According to plaintiff, at the start of the hearing on the motion the "court immediately turned to [him] to prove why this action should remain in California." This misstates the record, which shows the court had already issued a tentative order granting the motion but was giving plaintiff a chance to argue. The court's order was supported by declarations of the four non-attorney defendants confirming the Olsons lived in Arizona and the Pages lived in Utah but would consent to Arizona's jurisdiction and further agreeing to toll the statute of limitations for 90 days from the date of the court's order. Given that, and the evidence of multiple related lawsuits between the parties in Arizona, we reject plaintiff's arguments the court failed to

require non-attorney defendants to present supporting evidence why California was a seriously inconvenient forum or "that Arizona could and would take the case." (Bold and underlying omitted.)

2. Suitable Alternative Forum

Plaintiff argues the court also failed to find Arizona was a suitable alternative forum before dismissing the action. We disagree. The court implicitly so found when it granted the motion, noting plaintiff "is a resident of Arizona" and "the other private and public factors favor Arizona." (*Roman v. Liberty University, Inc.* (2008) 162 Cal.App.4th 670, 682 [court's finding of suitability implicit in order granting forum non conveniens motion]; accord *Investors Equity Life Holding Co. v. Schmidt* (2011) 195 Cal.App.4th 1519, 1529 (*Schmidt*).)

"The ruling on a forum non conveniens motion is generally reviewed for abuse of discretion with 'substantial deference . . . accorded [to the trial court's] determination in this regard. [Citations.]' [Citation.] But the 'threshhold determination whether the alternative forum is a suitable place for trial' involves 'a nondiscretionary determination' [citation] that is reviewed de novo [citation]." (*Schmidt, supra,* 195 Cal.App.4th at p. 1528.) "'An alternative forum is suitable if it has jurisdiction and the action in that forum will not be barred by the statute of limitations. [Citation.]'" (*Id*. at p. 1529.) Here, non-attorney defendants are all subject to Arizona jurisdiction whether by residence or consent and had agreed to toll the statute of limitations for a reasonable time.

Although plaintiff acknowledges his ability to sue in Arizona, he asserts "the Arizona court may very well on its own motion have determined that California should be the proper forum." But plaintiff's litigation would not be subject to a forum non conveniens dismissal if he re-filed his claims in Arizona because non-attorney defendants have agreed to submit to Arizona's jurisdiction. And "so long as there is

jurisdiction and no statute of limitations bar, a forum is suitable where an action 'can be brought,' although not necessarily won. There is no balancing of interests in this decision, nor any discretion to be exercised." (*Shiley, Inc. v. Superior Court* (1992) 4 Cal.App.4th 126, 132.)

As to the statute of limitations, plaintiff contends the court "never elicited" whether the applicable limitations period in Arizona had expired, without which it could not determine if "the proposed alternative forum is in fact suitable." But plaintiff admits in his opening brief that at the time the court dismissed the entire action in February 2012, "the applicable Arizona statute of limitation had not yet expired, albeit by a few days," and was not set to expire until early March 2012. Reviewing the issue de novo, we thus deem any failure by the court to determine if the statute of limitations had expired in Arizona harmless.

Plaintiff also argues that because the Arizona statute of limitations expired in March 2012, he did not have sufficient time to bring his action there if this appeal fails because he "cannot reasonably have been expected to litigate this action simultaneously in two different forums." But he does not explain why he could not have filed the action in Arizona and then asked to stay it pending the outcome of this appeal.

Moreover, non-attorney defendants agreed to toll the statute of limitations for 90 days to allow plaintiff to file his action in Arizona. Plaintiff asserts the agreement was illusory because in the cases cited by non-attorney defendants, the defendants all agreed to toll the statute of limitations whereas here attorney defendants did not so agree. (See *Campbell v. Parker-Hannifin Corp*. (1999) 69 Cal.App.4th 1534, 1540 [order staying California action based on forum non conveniens stipulated all three defendants submit to personal jurisdiction in Australia and agree to toll applicable Australian statute of limitations]; *Chong v. Superior Court* (1997) 58 Cal.App.4th 1032, 1038 [both the

defendants consented to tolling of any applicable statutes of limitation in Hong Kong during pendency of California action if stayed].) But whether attorney defendants agreed or not is irrelevant to our de novo review because they are no longer part of the case given plaintiff's failure to timely appeal from the separately appealable order dismissing them. And contrary to plaintiff's suggestion, the fact the trial court in the cited cases stayed rather than dismiss the California actions has no bearing on the issue of the suitability of the alternate forum.

Arizona constituted a suitable alternative forum in this case because the appellate record shows non-attorney defendants were subject to or stipulated to its jurisdiction and agreed to toll the applicable limitations period. We consider now the public and private interests in maintaining the action in California.

3. Public and Private Interests in Maintaining Action in California

Plaintiff contends the court abused its discretion weighing the private and public interest factors. "[W]e accord 'substantial deference' to the trial court's exercise of its discretion in considering [these] factors. [Citation.]" (*Schmidt, supra*, 195 Cal.App.4th at p. 1534.) "A court has exercised its discretion appropriately when 'the act of the lower tribunal is within the range of options available under governing legal criteria in light of the evidence before the tribunal.' [Citation.] In exercising its discretion, however, the court must bear in mind that the moving party bears the burden of proving that California is an inconvenient forum. . . . [¶] . . . [¶] . . . [T]he inquiry is not whether [the other state] provides a *better* forum than does California, but whether California is a *seriously inconvenient forum*. [Citation.] Unless defendants met their burden, the trial court necessarily abused its discretion." (*Ford Motor Co. v. Insurance Co. of North America* (1995) 35 Cal.App.4th 604, 610-611 (*Ford Motor*), called into doubt on another ground in *Campbell v. Parker-Hannifin Corp., supra,* 69 Cal.App.4th at

p. 1543.) Here, based on the evidence presented, the court did not abuse its discretion in balancing the factors and implicitly finding "California is a seriously inconvenient forum." (*Ford Motor Co., supra,* 35 Cal.App.4th at p. 611, italics omitted.)

a. Private Interests

"'The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses.' [Citation.]" (*Schmidt, supra,* 195 Cal.App.4th at p. 1534.)

Plaintiff admits that as a non-resident of California his "choice of forum is entitled to less deference." (*Ford Motor, supra,* 35 Cal.App.4th at p. 611.) But he maintains the "court was still required to give deference to [his] choice of forum." According to plaintiff, "California is the place of the wrong, the identified witnesses are located in California, the underlying facts of this case are closely entwined with California, California law will likely apply regardless of the forum, and California can provide a more cost and time efficient forum to adjudicate this action."

Plaintiff, however, identifies only the trustees and his aunt, Diane Disney Miller, as potential witnesses in California. By contrast, none of the parties are California residents and all, including plaintiff, live in Arizona or have stipulated to the jurisdiction of the Arizona courts. Several other witnesses also reside in Arizona, including plaintiff's father, who had been a co-trustee of the trusts until he resigned in 2010, and the recently dismissed attorney defendants. Because these non-Californian residents cannot be compelled to testify as witnesses or provide deposition testimony in California (*Prisch v. Superior Court* (1959) 52 Cal.2d 889, 889; *Toyota Motor Corp. v. Superior Court* (2011) 197 Cal.App.4th 1107, 1110, 1113, 1114, 1125), "the availability

of the compulsory process for witnesses" factor (*Ford Motor*, *supra*, 35 Cal.App.4th at p. 616) favors Arizona. The court could also reasonably infer the parties' residency and submission to Arizona jurisdiction as well as the number of witnesses in Arizona as compared to California made Arizona relatively more convenient and advantageous to all parties, less expensive to procure witnesses, and reduced the "inconvenience of presenting testimony by deposition." (*Ibid*.; see also *Price v. Atchison, T. & S.F. Ry. Co.* (1954) 42 Cal.2d 577, 580 [defense costs of bringing witnesses from New Mexico more expensive and trial testimony by deposition less effective].) Plaintiff's arguments to the contrary seek to have this court reweigh the evidence, which we may not do under an abuse of discretion standard of review where, as here, the trial court's ruling does not exceed the bounds of reason. (*Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1351-1352.)

b. Public Interests

"'The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. [Citations.]' [Citation]." (*Schmidt, supra*, 195 Cal.App.4th at pp. 1535-1536.)

Plaintiff contends "California has a fundamental interest in ensuring that its trusts are being properly administered pursuant to its laws." But neither the administration of the California trust, nor the conduct of the trustees, is the crux of plaintiff's current lawsuit, which instead involves claims defendants induced a breach of fiduciary duty and invasion of privacy. In other words, it was a dispute between Arizona and Utah residents, notwithstanding plaintiff's contention otherwise.

Plaintiff represents this is a simple case that would not overburden California courts any more than Arizona courts. That may be but the court could have reasonably concluded California had minimal interest in burdening its courts, jurors, and legal system with a quarrel between residents of two foreign states. (See *Price v. Atchison, T. & S.F. Ry. Co*., *supra*, 42 Cal.2d at pp. 583-584.)

Although plaintiff also argues California has a significant interest in deciding this case because that is where the alleged tortious conduct occurred, the place of the wrong is a factor for the court to consider, but not a controlling one (*Hernandez v. Burger* (1980) 102 Cal.App.3d 795, 801-802), particularly where, as here, the majority of the witnesses and evidence are located in a different forum (*Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452, 1466). Additionally, his lawsuit against non-attorney defendants alleges he sustained damages in Arizona, "including having to spend over $1.5 million in defense of the frivolous actions in Arizona" and the invasion of his privacy rights "resulting in stories being run in an Arizona newspaper." Thus, even if wrongful conduct occurred in California, evidence of plaintiff's damages would be found in Arizona and courts have held California to be an inconvenient forum under those circumstances. (See *Stangvik v. Shiley Inc.*, *supra*, 54 Cal.3d at p. 762 [foreign plaintiffs not entitled to California forum where "much, but not all, of the evidence concerning liability exists in California, but virtually all the evidence relating to damages is in Scandinavia"].)

Plaintiff maintains California has an interest in retaining the case because Arizona will likely apply California law. While he is correct "California has an interest in the proper application of its laws to a dispute," he provides no explanation as to why Arizona courts would not be able to properly apply California law. Nor has he cited any authority allowing a California court to determine whether another state's court system affords sufficient due process.

4. Dismissal Rather than Staying of the Action

Nevertheless, we conclude the court erred in dismissing the case rather than staying it to ensure non-attorney defendants are actually subjected to jurisdiction in Arizona and no Arizona statutes of limitations apply to bar plaintiff's claims. The only means to provide those assurances is for the court to stay, rather than dismiss, the instant California case.

Non-attorney defendants maintain the trial court correctly dismissed the action rather than staying it "[b]ecause no party is a California resident." But none of the cases on which they rely involves an agreement to toll the applicable statute of limitations. (See *Price v. Atchison, T. & S.F. Ry. Co.*, *supra*, 42 Cal.2d at p. 579; *Henderson v. Superior Court* (1978) 77 Cal.App.3d 583; *Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, 858-859, superseded in part by statute as stated in *Stangvik v. Shiley*, *supra*, 54 Cal.3d at p. 755.) Rather, in the cases they cite to support their claim agreements to toll the limitations period suffice to establish the suitability of an alternative forum, the trial court stayed rather than dismissed the California actions. (See *Campbell v. Parker-Hannifin Corp.*, *supra*, 69 Cal.App.4th at p. 1538; *Chong v. Superior Court*, *supra*, 58 Cal.App.4th at p. 1035.) Under these cases, we conclude the appropriate resolution of non-attorney defendants' motion is to stay the California proceeding rather than dismissing it outright.

DISPOSITION

The trial court did not abuse its discretion in finding the balance of private and public interests weighed in favor of litigating this action in Arizona. But it erred in dismissing, rather than staying, the action. Therefore, on remand, the trial court may either (1) deny non-attorney defendants' motion to dismiss or stay the action, or (2) grant

the motion to stay the action. Because the statute of limitations has run in Arizona, any stay granted on remand must be subject to non-attorney defendants' agreement to toll the Arizona statute of limitations from the filing of the California action until 90 days after the remittitur in this case issues. In the interest of justice, the parties shall bear their own costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.